

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of

Victoria P.,

Claimant,

vs.

San Diego Regional Center,

Service Agency.

OAH No. L2005100507

**DECISION**

Alvin J. Korobkin, Administrative Law Judge, Office of Administrative Hearings, heard this matter in San Diego, California, on January 17, 2006.

Bernadette Bautista, Esq., Office of Clients' Rights Advocacy, represented claimant.

Ronald House, Esq., represented San Diego Regional Center (SDRC), the Service Agency.

At the close of the hearing on January 17, 2006, both parties requested the record remain open until January 27, 2006, in order to file simultaneous written briefs. Both written briefs were filed on that date. The Service Agency's brief was marked for identification as Exhibit 5, and claimant's brief was marked for identification as Exhibit 6. The record was closed, and the matter was submitted for decision.

**ISSUES**

1. Should the Service Agency fund claimant's transportation to attend her speech therapy sessions?
2. Should the Service Agency fund claimant's transportation to attend her counseling sessions?
3. Should the Service Agency retroactively fund claimant's transportation to attend the classes which comprise her individualized day program?

## FACTUAL FINDINGS

### *Jurisdiction*

1. Claimant is 32 years old and is diagnosed with mental retardation and Down Syndrome. She attends tennis, ice-skating, quilting, sailing, theater and clay making classes on a weekly basis. She also attends weekly counseling sessions and bi-monthly speech therapy sessions. Claimant's mother transports her because claimant is unable to safely use public transportation. Despite claimant's disabilities, she is a talented athlete who participates in the Special Olympics. On July 7, 2005, claimant's mother asked the San Diego Regional Center ("SDRC") to fund claimant's transportation to attend the classes, counseling sessions, and speech therapy sessions. On July 13, 2005, SDRC denied claimant's request.

2. On or about October 14, 2005, after having previously rejected two fair hearing request forms for technical reasons, SDRC accepted a fair hearing request filed by claimant. A fair hearing was scheduled for January 17, 2006, to determine whether SDRC should fund claimant's transportation to her speech therapy sessions, counseling sessions, and various classes she attends during the day.

3. On November 29, 2005, SDRC granted claimant's request to fund claimant's transportation to the various classes she attends during the day, effective that same day.

### *The Lanterman Developmental Disabilities Services Act*

4. The California Legislature enacted the Lanterman Developmental Disabilities Services Act (the Lanterman Act) to provide facilities and services to meet the needs of those with developmental disabilities, regardless of age or degree of handicap. The purpose of this comprehensive statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community; and, to enable developmentally disabled persons to approximate the pattern of everyday living of nondisabled persons the same age and to lead more independent and productive lives in the community.

The statutory scheme requires state agencies, such as the Department of Developmental Services (the DDS), and private entities, such as regional centers (one of which is the SDRC) to implement the Lanterman Act. The DDS has jurisdiction over the execution of laws related to the care, custody, and treatment of developmentally disabled persons. Regional centers, private nonprofit community agencies under contract with the DDS, are charged with providing developmentally

disabled persons with access to the facilities and services best suited to them throughout their lifetime.<sup>1</sup>

Welfare and Institutions Code section 4648, subdivision (a)(1) states that the SDRC "...shall secured in the consumer's individual program plan, and within the context of individual program plan, the planning team shall give the highest preference to those services and supports which would allow...adult persons...to live as independently as possible in the community, and that allow all consumers to interact with persons with disabilities in positive meaningful ways."

### *The IPP Concept*

5. Welfare and Institutions Code sections 4646 and 4646.5 set forth criteria that relate to the development and modification of an individual program plan (IPP) for a person with a developmental disability.

An IPP is developed through a collaborative effort involving the regional center and the consumer and/or the consumer's representative(s). The planning process involves gathering information and conducting assessments to identify the consumer's life goals, capabilities and strengths, preferences, barriers, and concerns or problems.

An IPP must include a statement of the consumer's goals, based on the consumer's needs, preferences, and life choices. An IPP must contain specific, time-limited objectives to implement identified goals and must address the consumer's needs. Objectives must allow measurement of progress and monitoring of service delivery. Identified goals and objectives should maximize a consumer's opportunity to develop relationships and participate in community life in housing, work, school, and leisure activities. Identified goals and objectives should increase the consumer's control over his or her life, should assist the consumer in acquiring increasingly positive roles in community life, and should be directed towards developing competency to help accomplish these goals.

Through the Lanterman Act, the Legislature seeks to ensure that the provision of services is effective in meeting IPP goals, that the IPP reflects the preferences and choices of the consumer, and that the IPP is cost-effective in its use of public resources.<sup>2</sup>

6. According to its denial letter of July 13, 2005, SDRC denied claimant's request to fund transportation to speech therapy and to counseling on the grounds that

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<sup>1</sup> See, *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119. The Lanterman Act is found at Welfare and Institutions Code section 4500 et seq.

<sup>2</sup> See, Welfare and Institutions Code sections 4646 and 4646.5.

its Purchase of Service Guidelines state that “parents and care providers have the responsibility of providing transportation for ... medical appointments.”

7. During the fair hearing, Peter Hylen, program manager at SDRC, testified that funding for transportation to claimant’s speech therapy and counseling sessions was denied because claimant had not shown a sufficient nexus between her developmental disabilities and the service being provided, and that transportation funding is generally provided to adult consumers for things such as work or college, but rarely for medical appointments unless the appointment is clearly linked to a developmental disability.

8. There is no dispute about whether claimant needs her mother to transport her to her speech and counseling sessions. Claimant cannot take transportation independently because she is easily distracted and cannot pay attention to the dangers around her. She cannot be trained to take public transportation because of her developmental disabilities. She does not know her address or phone number. She does not know the name of the street she lives on. She does not look for cars when she is walking, and walks with her head down. She is easily influenced by strangers, and might come to harm for that reason.

#### *Speech Therapy Sessions*

9. SDRC has acknowledged claimant’s serious speech impediments and her need for speech therapy in the IPP prepared and signed by SDRC and claimant’s mother dated June 21, 2005. Improvement in speech was continued as an IPP objective.

10. In a letter dated September 19, 2005, Speech-Language Pathologist Melissa Essenburg stated that claimant had been attending speech and language therapy at her office since April 28, 2005; that her coverage was transitioned from once weekly under Medicare to two visits per month under Medi-Cal; that claimant presents with a severe expressive and receptive language delay as well as a significant articulation disorder secondary to Down Syndrome. Ms Essenburg further stated that speech therapy is medically necessary for claimant to be able to express her wants and needs for activities of daily living.

11. John Vaughn, M.D., who had been treating claimant for several years for trisomy 21 with hearing loss, previously fitted claimant with hearing aids which were funded by SDRC. According to claimant’s mother, Dr. Vaughn recommended speech therapy for claimant because of the effect Down Syndrome has on claimant’s ability to hear certain frequencies and the resulting speech impairment. Dr. Vaughn wrote a letter dated September 19, 2005, in which he stated that claimant has had ongoing problems with speech and language and recommended speech and language evaluation and treatment for claimant.

12. Mr. Hylen testified he does not rely solely on his own opinions to determine the sufficiency of professional letters supporting requests for additional services; he relies upon experts on SDRC's staff to determine the sufficiency and accuracy of those letters. However, no testimony or written statements from any speech and language expert on SDRC's staff was presented at the fair hearing.

### *Counseling Sessions*

13. The IPP states that claimant and her mother currently see a clinical psychologist for counseling sessions on a weekly basis; that claimant often gets defiant with her mother and it seem to happen all the time; that claimant is resistive on a daily basis, for example when claimant spit in her mother's face when her mother was brushing claimant's teeth; and that claimant and her mother are together 24/7 so it is not surprising that they have some difficulties. The IPP also recites that claimant has some serious behavior issues; that claimant threw water at her mother when her mother was trying to help her bathe; that claimant throws things at her mother regularly; that claimant once threw a duster with a wooden handle at her mother; that claimant has tantrums when she does not get what she wants when she wants it; that claimant will stomp her feet and make a scene, sometimes in public places; and that the "weekly visits to the psychologist are important for [claimant] and her mother to be able to express their frustrations."

14. In a letter dated January 6, 2006, Robert E. Lee, Ph.D. noted that he has been treating claimant for many years; that claimant's Down Syndrome disability causes her serious impairments in a number of areas and that because of the limitations of her disability she becomes aggressive, angry, depressed, and is oftentimes confused. Dr. Lee continued that a major accomplishment of his therapy sessions with claimant is that she has not had to be institutionalized. Instead claimant has been able to live in the mainstream despite her diminished capacity. Claimant and her mother have had many trying times together over the years which very likely would not have been worked through if claimant had not been brought to therapy. Dr. Lee concludes, "It is my opinion that [claimant] needs counseling in order to address the issues that have accompanied her Down's condition."

15. No testimony or written statements from any counseling expert on SDRC's staff was presented at the fair hearing.

### *Individualized Day Program Classes*

16. According to SDRC's denial letter dated July 13, 2005, SDRC initially denied claimant's request to fund transportation to attend day classes on the grounds that SDRC's Purchase of Services Guidelines limits such transportation funding "to attend the nearest appropriate day program to their residences; that transportation for Victoria to attend classes at Southwestern College only had been approved; and that transportation other than to classes at Southwestern College would be denied because

such classes would fall under the Guideline Category of “social and recreational activities,” which are the responsibility of claimant’s mother.

17. Peter Hylen testified that the day program referred to in the Guidelines consists of a number of classes offered at the regional center for consumers who have graduated from a high school program, to take the place of school programs. They include classes in skills, self-help, socialization, wheel chair and toilet training, vocational, and behavioral management.

18. On November 29, 2005, after meeting with claimant and her mother, SDRC decided to create a unique individualized day program for claimant, rather than the traditional day program, and to fund her transportation costs five days per week for classes she was taking at various locations throughout San Diego. These classes include ice-skating, quilting, theater, clay, sailing, and tennis. Ice-skating, for example, is usually considered a social and recreation program, not a day program, and thus not covered by SDRC transportation funding. Mr. Hylen testified SDRC made an exception for claimant, creating an individualized day program to meet claimant’s unique talents and interests. The IPP describes these talents and interests in great detail. This transportation funding was to be effective immediately, on November 29, 2005, and not retroactively.

19. Mr. Hylen testified that there are thousands of adult consumers of SDRC and approximately two-thirds of those consumers attend the traditional day program offered and funded by SDRC, with smaller percentages either working, in rehabilitation, or attending community college. In the 18 years he has been employed by SDRC he is aware of only one other adult individualized day program approved by SDRC.

## LEGAL CONCLUSIONS

1. Based upon all of the evidence received at the fair hearing, there is sufficient evidence in the record to establish that claimant’s speech therapy sessions are required as a result of claimant’s developmental disabilities. A sufficient link between claimant’s developmental disabilities and the service provided at claimant’s speech therapy sessions has been shown. These speech therapy sessions do not constitute routine medical appointments, which are unrelated to the consumer’s disabilities, for which transportation is not required under the Lanterman Act or SDRC’s Purchase of Service Guidelines.

2. Based upon all of the evidence received at the fair hearing, there is sufficient evidence in the record to establish that claimant’s counseling sessions are required as a result of her developmental disabilities. These counseling sessions do not constitute routine medical appointments, unrelated to developmental disabilities, for which transportation is not required under the Lanterman Act or SDRC’s Purchase of Service Guidelines.

3. Welfare and Institutions Code section 4512, subdivision (b), provides that services and supports listed in the IPP may include speech therapy and counseling.

#### *Retroactivity*

4. Claimant seeks retroactive funding for transportation to her classes, speech therapy sessions and counseling sessions, back to July 7, 2005, the date she originally requested funding for such transportation.

5. The Lanterman Act expressly provides for retroactive reimbursement only in the event of an emergency provision of services. Welfare and Institutions Code section 4648, subdivision (a)(3). In the event of an obvious error by SDRC in denying a service, however, SDRC will provide retroactive reimbursement as a matter of policy. That is not the situation here. When SDRC decided on November 29, 2005, to create an individualized, non-traditional day program for claimant, it was being “creative and innovative” in “meeting the family’s needs and providing adequate supports to keep the family together. . .” as required by the Lanterman Act. Approval of an individualized day program is rare, and SDRC’s failure to have approved transportation funding for claimant for such a program until November 29, 2005, was not an obvious error.

6. Similarly, SDRC’s decision to deny transportation funding for claimant’s speech therapy sessions and counseling sessions was made in good faith and was not an obvious error on the part of SDRC. The letters written by Speech-Language Pathologist Melissa Essenburg and John Vaughn, M.D. were not seen by SDRC until November 29, 2005. The letter written by Robert E. Lee, Ph.D. was not seen by SDRC until January 6, 2006, at the earliest. While SDRC has funded behavior modification therapy in the past, and has funded aggression or resistance therapy in the past, this is apparently the first time SDRC will be funding counseling sessions. Not to have approved transportation funding for claimant for her speech therapy sessions and for her counseling sessions was not an obvious error on the part of SDRC.

#### *Generic Resources for Transportation*

7. Claimant’s mother testified she made numerous phone calls to Medi-Cal in order to determine if Medi-Cal would fund claimant’s transportation to her speech therapy and counseling sessions. She was unable to obtain any information from Medi-Cal regarding this issue. SDRC’s position is that it normally requires a written denial of services from a generic source before SDAC will provide that service. In this case, however, it is clear from the record that claimant’s mother has diligently pursued generic resources for her daughter’s speech therapy and counseling sessions, and there is no reason to doubt her diligence in seeking to obtain generic funding for transportation. SDRC can contact Medi-Cal directly if it wishes to

determine if Medi-Cal will fund claimant's transportation to speech therapy sessions and counseling sessions.

#### ORDER

1. SDRC is required to fund claimant's transportation to attend her speech therapy sessions.

2. SDRC is required to fund claimant's transportation to attend her counseling sessions.

3. SDRC is not required to retroactively fund claimant's transportation to attend her speech therapy sessions, counseling sessions, or the classes which comprise her individualized day program.

#### NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

DATED: May 22, 2006

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ALVIN J. KOROBKIN  
Administrative Law Judge  
Office of Administrative Hearings